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May 25, 2012

VIA ECF AND FEDEX

Hon. Cathy L. Waldor, U.S.M.J.
United States District Court
District of New Jersey
M.L. King Federal Building & Courthouse
50 Walnut Street
Newark, New Jersey 07101

**Re: *BanxCorp v. Bankrate, Inc.*, Civ. No. 07-3398 (ES-CLW)
BanxCorp v. LendingTree, LLC, Civ. No. 10-2467 (ES-CLW)**

Dear Judge Waldor:

This firm represents defendant Bankrate, Inc. ("Bankrate") in the referenced action. I write to seek a protective order from the Court in connection with an untimely deposition notice served by the plaintiffs last week for the deposition of a witness who the plaintiff had never previously identified as a potential witness. (*See Ex. A.*)

Fact discovery was scheduled to end on April 30, 2012. On April 27, 2012 the parties appeared for a telephone conference with Your Honor during which the parties discussed the need for an extension to the April 30, 2012 fact discovery deadline in order to address four open deposition issues. As a result of that conference, the Court extended the discovery deadline to May 31, 2012 solely to allow the parties and the Court to address four issues that remained concerning the depositions of Tom Evans, Peter Morse, Diana Mehl, and Roy Adams.¹ During the telephone conference, BanxCorp did not identify any additional depositions it wished to take.²

This case is about to enter its sixth year. For the last 18 months, BanxCorp has stated dozens of times that it would take depositions of only three Bankrate witnesses: Tom Evans, Peter Morse,

¹ The need for an extension was occasioned by BanxCorp's last-minute cancellation of Tom Evans' April 20, 2012 deposition when Bankrate insisted that BanxCorp comply with the Discovery Confidentiality Order. In addition, the discovery period was extended so the Court could decide (1) whether to allow the deposition of Bankrate's Chairman, Peter Morse, which this Court has, to date, precluded because BanxCorp has not made any showing that Mr. Morse has any relevant knowledge not obtainable through other sources and (2) whether to order, for the third time, BanxCorp to produce Diana Mehl for deposition because of BanxCorp's refusal to produce Mrs. Mehl.

² During the April 27 telephone conference, the parties advised the Court that they had agreed to reschedule Mr. Evans' deposition for May 9, 2012. During that call, Norbert Mehl insisted that discovery close after the completion of Mr. Evans' deposition.

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and Elisabeth DeMarse (Bankrate's former CEO). That representation was made directly to the Court each time the scheduling of depositions was discussed. The first time BanxCorp identified Petra Bowman as a potential witness was when it served a notice for her deposition on May 21, 2012. The notice is untimely, and we respectfully ask that the Court prohibit the deposition.

It is important to emphasize that fact discovery would have ended on April 30, 2012 but for BanxCorp's shenanigans in canceling Mr. Evans' deposition and refusing to abide by this Court's orders concerning other witnesses. BanxCorp should not be allowed to take advantage of its own misconduct to expand discovery at the last minute. BanxCorp is effectively seeking an extension of the discovery deadline, but one who seeks such special treatment must show good cause. *Salamone v. Carter's Retail, Inc.*, 2012 WL 821494, at *5 (D.N.J. 2012) (permitting modification of a scheduling "order upon a showing of good cause."). The existence of good cause depends, in part, on the "diligence" of BanxCorp. *Fermin v. Toyota Material Handling*, 2012 WL 1393074, at *3 (D.N.J. Apr. 23, 2012).

Here, BanxCorp has plainly not been diligent. BanxCorp has been aware of Ms. Bowman for years. Ms. Bowman appears on over 1,700 documents that were produced by Bankrate, including documents that were produced over two years ago. Moreover, the deposition notice indicates that many, if not most, of the topics that BanxCorp wishes to examine Ms. Bowman on relate to a description of her job that BanxCorp pulled off Ms. Bowman's personal LinkedIn profile that appears to have been available for some time. BanxCorp cannot possibly claim that it waited until now to notice Ms. Bowman's deposition because it only recently learned of her employment.³

Fed. R. Civ. P. 16 "allows a court to take judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps." *Id.* at *2. The rule's "purpose is to provide for judicial control over cases, streamline proceedings, maximize efficiency of [the] court system, and actively manage [the] timetable of case preparation to expedite speedy and efficient disposition of cases." *Id.* (citing *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3d Cir. 1990)); see also Local Civil Rule 72.1. In deciding such scheduling issues, "a magistrate judge [has] wide-ranging discretion to manage the scheduling of discovery," *Glazewski v. Corzine*, 2008 WL 5388100, at *1 (D.N.J. Dec. 22, 2008), and "to conduct discovery in a manner that he or she deems fit," *Net2Phone, Inc. v. Ebay, Inc.*, 2008 WL 4755612, at *1 (D.N.J. Oct. 27, 2008). A magistrate judge will only be reversed for abuse of discretion in this context. *Id.*

³ BanxCorp's deposition notice indicates that one of the areas it wishes to examine Ms. Bowman on relates to keyword advertising, that is, Bankrate's use of search engines like Google to generate traffic on its site. Attached hereto as Exhibit B is a copy of a document produced by BanxCorp itself several years ago in this litigation in which Ms. Bowman is identified as one of two people at Bankrate involved in Bankrate's search engine advertising program.

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For these reasons, we respectfully request that the Court prohibit BanxCorp from expanding the scope of discovery at this late date.

Respectfully submitted,



R. Scott Thompson

Enclosures

cc: Kristen Renzulli, Esq. (via ECF w/enc.)
Lawrence Hersh (via ECF w/enc.)
Daniel Brown, Esq. (via ECF w/enc.)
Michael Hahn, Esq. (via ECF w/enc.)
Eric Jesse, Esq. (via ECF w/enc.)

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BANXCORP,

Plaintiff,

v.

BANKRATE, INC.,

Defendant.

Civil Action No. 07-3398 (ES)(CLW)
Civil Action No. 10-2467 (ES)(CLW)

**NOTICE OF DEPOSITION
OF PETRA BOWMAN**

BANXCORP,

Plaintiff,

v.

LENDINGTREE, LLC,

Defendant.

TO: R. Scott Thompson, Esq.
Lowenstein Sandler PC
65 Livingston Avenue, Roseland, NJ 07068
Counsel for Defendant Bankrate Inc.

PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 30, testimony will be taken from Petra Bowman upon oral examination before a person duly authorized to administer oaths, on Tuesday, May 29, 2012, beginning at 10:00 a.m. in Courtroom MLK 4C (jury room annex) at 50 Walnut Street, Newark, New Jersey, with respect to the topics set forth in Schedule A attached hereto. The deposition will continue from day to day thereafter until completed. This deposition will be recorded by audio, audiovisual or stenographic means.

Dated: May 21, 2012

s/ Kristen Renzulli

Kristen Renzulli, Esq.

Law Offices of Kristen Renzulli, PC

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Counsel for Plaintiff BanxCorp

Schedule A

DEFINITIONS

- A. "Bankrate" refers to Defendant Bankrate, Inc.
- B. "Fifth Amended Complaint" refers to the Fifth Amended Complaint filed by BanxCorp against Bankrate Inc. (Doc. Nos. 300, 300-1).
- C. "Co-branding Partners (or Partner Sites)" refers to that term as it is used throughout the Fifth Amended Complaint.
- D. "Rate table," or "rate table listings" refers to that term as it is used throughout the Fifth Amended Complaint.
- E. "Relevant Market" refers to that term as it is used throughout the Fifth Amended Complaint.
- F. "Bid Management" refers to that term as it is used at <http://www.linkedin.com/in/petrabowman> (as seen on May 21, 2012).¹
- G. "Competitive Intelligence Data Analysis" refers to that term as it is used at <http://www.linkedin.com/in/petrabowman> (as seen on May 21, 2012).
- H. "Destinations Websites" refers to Bankrate's own websites Bankrate.com, Interest.com, and Bankaholic.com.
- I. "Search Engine Marketing" refers to that term as it is used at <http://www.linkedin.com/in/petrabowman> (as seen on May 21, 2012)
- J. "Vertical Price Squeeze" refers to that term as it is used throughout the Fifth Amended Complaint.
- K. "Web Analytics, Web Site Statistics and Analysis" refers to these terms as they are used at <http://www.linkedin.com/in/petrabowman> (as seen on May 21, 2012).

¹ See also documents labeled BX0027257-BX0027259.

TOPICS

1. The allegations in paragraphs 63-64, 169-170, 176-184 of the Fifth Amended Complaint.
2. Competitive Intelligence Data Analysis of Bankrate's destination websites and Bankrate's Co-Branding Partner Sites for the period of 2005 to 2009.
3. Competitive Intelligence Data Analysis of Bankrate's independent competitors' websites offering Internet rate table listings for the period of 2005 to 2009.
4. Competitive Intelligence Data Analysis of Bankrate's Co-Branding Partner Sites and their competition against Bankrate's destination websites for the period of 2005 to 2009.
5. Bankrate's paid search engine bids and listings for the period of 2005 to 2009, with a particular focus on the highest prices bid and paid by Bankrate for search engine keywords in the relevant market month by month for the period of 2005 to 2009.
6. Analysis of the highest prices bid and paid by Bankrate for search engine keywords in the relevant market, in comparison to the cost-per-click prices charged by Bankrate for rate table listings (by corresponding product categories), month by month for the period of 2005 to 2009.
7. Search Engine Rankings of Bankrate's destination websites and Bankrate's Co-Branding Partner Sites for the period of 2005 to 2009.
8. Search Engine Rankings of Bankrate's independent competitors' websites offering Internet rate table listings for the period of 2005 to 2009.
9. Web Analytics, Web Site Statistics and Analysis of Bankrate's destination websites and Bankrate's Co-Branding Partner Sites for the period of 2005 to 2009.
10. Web Analytics, Web Site Statistics and Analysis of Bankrate's independent competitors' websites offering Internet rate table listings for the period of 2005 to 2009.

CERTIFICATE OF SERVICE

I certify that on this date, the foregoing Notice of Deposition of Petra Bowman, and documents labeled BX0027257-BX0027259 were served on counsel for Defendant Bankrate Inc. by e-mail to:

R. Scott Thompson, Esq.
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Roseland, NJ 07068
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Dated: Chappaqua, New York
May 21, 2012

s/ Kristen Renzulli
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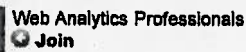
3rd Rafael Z.

Activities and Societies: Aikido

3rd Rafael Z.,
managed Petra at Interest.com/MMIS

Web 2.0
Join

BX0027258



You can email me at metavix@gmail.com

- **Get introduced through a connection**
- **Send InMail**

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Exhibit B

Google™ Success Stories

AdWords

- [AdWords Home](#)
- [Success Stories](#)
- [Submit a Story](#)
- [More Stories](#)

Google Custom Search



"Google has a great handle on delivering relevancy, and that's what we strive to do: deliver the right message to the right person at the right time. For example, we pair all of our ads with appropriate landing pages so we can drop off our customers in the best place within the clickstream." – Rafael Zorrilla, director of interactive marketing for Bankrate.com

First Rate

From 2006 to 2007, Bankrate.com used Google AdWords testing and targeting features to increase measured conversions by 102% and click-through-rate by 57%.

Bankrate.com's story is one of early adoption. Started 25 years ago as a newsletter for mortgage industry professionals, Bankrate acquired dot com status in 1994 – shortly after the browser was born – and shifted its focus to financial information for consumers.

"At the time, the idea of providing unbiased, objective, comprehensive financial information to the consumer was new," says Michael J. Ricciardelli, Bankrate.com's senior vice president of consumer marketing. "That core idea hasn't changed. We now have 22 in-house editors and reporters and provide free rate information to consumers on more than 300 financial products."

Online investments

The site and business evolved with the market. "We're not shy in trying new things," says Rafael Zorrilla, director of interactive marketing for Bankrate.com. "In 2002 Google AdWords and the concept of cost-per-click (CPC) was new, but we had a diverse range of content that we knew some people weren't aware of. We thought Google was an excellent way to get in front of people looking for that information, be it mortgage rates or college planning." By 2004, Bankrate.com was itself based on a cost-per-click model.

The more Bankrate.com worked with AdWords™, the more it was able to match various features to its needs. "We became very systematic in how we test our ad copy and messaging," explains Rafael. "CD's are a great example. We mean certificates of deposit, not a music CD. Or an ARM loan, not arm the appendage. It's data

Who they are

Bankrate.com 

- www.bankrate.com
- North Palm Beach, Florida
- 264 employees
- An Internet consumer banking marketplace

 [Download PDF](#)

What they use

[Google AdWords](#)

What they accomplished

- **Improved clickstream:** Focus on targeted landing pages increased revenue derived from AdWords traffic by 66%
- **Increased conversions:** Measured conversions increased by more than 102% from 2005 to 2007
- **Developed highly-effective ads:** Constant testing resulted in a 57% increase in click-through-rate (CTR)
- **Improved return:** Increased its return-on-advertising-spend (ROAS) by 35% from 2006 to 2007

Get started with
Google AdWords

BX000629

driven, very easy to do in AdWords, and feedback is immediate. It's a great way to see if a message to a consumer resonates."

"And what makes Google really unique is the quality score," adds Petra Bowman, web marketing manager at Bankrate.com. Quality Score is a dynamic metric assigned to each keyword. It's calculated using a variety of factors and measures how relevant a keyword is to ad text and to a user's search query. "We pay close attention to it. It really helps us revise our lists."

From 2006 to 2007, Bankrate.com's focus on testing and refining ad copy led to a click-through-rate (CTR) increase of 57 percent. And by lowering its CPC through careful budget management, it managed to increase click volume by 6 percent without increasing costs.

To manage the nuances of these ad messages and their keyword lists, Rafael's team uses different tools and features. "AdWords Editor allows us to easily make changes to our ad copy and keywords, saving us time, and negative keywords ensure we match to our target audience," he says.

AdWords Editor is a free, downloadable application for managing AdWords accounts. Advertisers can work offline and upload changes to campaigns, ad groups, ads, keywords, and sites quickly and easily. A negative keyword is a kind of keyword that prevents ads from showing on irrelevant search queries. Adding a negative keyword to an ad group or campaign means that the ad won't show for search queries containing that term.

By applying these strategies to its campaign development, Bankrate.com has increased measured conversions by 102 percent from 2005 to 2007.

Increasingly sophisticated

Bankrate.com's online advertising methodology mirrors its own business channels. "The sole purpose of our AdWords campaigns is direct response," says Rafael. "But we now match our approach to using AdWords to each business channel, on a channel by channel basis. We understand the seasonality of each channel. As a result, we're no longer throwing stuff at the wall. We've grown quite sophisticated."

This process involves understanding the clickstream – the actions potential customers take on the Internet as they search for information that Bankrate.com can provide.

"We're looking for in-market consumers," he explains. "Google has a great handle on delivering relevancy, and that's what we strive to do: deliver the right message to the right person at the right time. For example, we pair all of our ads with appropriate landing pages so we can drop off our customers in the best place within the clickstream." By using targeted landing pages, Bankrate.com has increased revenue derived from AdWords traffic by 66 percent.

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In addition to targeted landing pages, Bankrate.com now uses both demographic and geographic targeting, as well as text and image ads on Google's content network, which has helped increase its return-on-advertising-spend (ROAS) by 35 percent from 2006 to 2007.

Keyword ready

Michael and Rafael believe there are two key components to Bankrate.com's success. The first is trust. "A unique aspect of Bankrate.com is how we've established ourselves as a trusted resource with unbiased, free information," says Michael. "We've been online for a long time. We're proven."

The second is a willingness to evolve. "In the long term, we want to evolve to match consumers' needs," explains Rafael. "In the near term, if financial markets shift, we have to be keyword ready."

Their advice for companies developing their online advertising strategies? "We've gained knowledge, and it's not always black and white," Rafael continues. "There's a lot of learning to be done. But no matter what, you have to commit resources to test and try new ways to do stuff. That's what I love about Google – the constant innovation. It allows us to test and explore."

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